





When sexting conflicts with child sexual abuse material: the legal and social consequences for children

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When children participate in online sexual behaviour, such as ‘sexting’, there can be a range of legal and social consequences. Criminal law in Australia does not consistently address sexting, which means that in some jurisdictions, children who participate in sexting can be liable for offences related to child sexual abuse material (CSAM). Children who are 16 or 17 years old have reached the age to consent to sexual activity, yet the law, in many jurisdictions, does not allow them to participate in sexting. This paper seeks to reconceptualise sexting among older children as a separate practice to possessing and/or distributing CSAM. It explores the socio-legal considerations which arise when older children possess and share intimate online material, including how the age of consent to sexual activity is relevant to their participation in sexting.

Keywords: child exploitation material; child pornography; child sexual abuse material; consent; criminal law; sexting; youth.

Introduction

‘Sexting’ refers to ‘the electronic communication of ... images or videos portraying one or more persons in a state of nudity or otherwise in a sexual manner’.¹ ‘Sexting’ is a colloquial, and somewhat unsavoury, term used to describe online sexual behaviour. It usually involves the sender sharing the compromising and/or sexual images or videos of themselves via phone or Internet platforms.

There are myriad reasons why children participate in online sexual behaviour such as sexting. Children may view sexting to be normal sexual communication in this digital age that further enhances peer relationships.² It may also improve a child’s body image and/or serve as a substitute for more physical intimacy amongst peers.³ However, sexting can

also be harmful, as it potentially exacerbates gender pressures, mental health concerns and bullying.⁴

Because the nature of sexting involves intimate content in electronic form, it can easily be shared beyond the intended recipient, which raises many social and legal issues. The legal issues, specifically, can include potential actions in privacy, nuisance, defamation and copyright, as well as possible criminal actions.⁵ The significance of sexting, then, cannot be overstated. The Supreme Court of Australia, in the Court of Criminal Appeal, considered the behaviour of ‘sexting’:

This Court can, and indeed should, take judicial notice of the legitimate community concern about children engaging in the practice known as

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‘sexting’. One salient aspect of that concern is the misuse by adults of access to children through social media to persuade or trick them into engaging in sexualised communications.⁶

Criminal law does not consistently address online sexual behaviour. Some jurisdictions, such as South Australia (SA), Victoria and New South Wales (NSW), expressly prescribe offences relating to sexting and have decriminalised some sexting-related behaviour. In other jurisdictions, sexting is considered child sexual abuse material (CSAM).

In this paper we argue that while CSAM offences are serious criminal offences, the rationales for criminalising CSAM offences perpetrated by children – particularly when no child is abused or exploited in the production – is less clear. This is the case with most sexting cases, as children are willingly sharing intimate content with another child.⁷ When the sender and recipient are both children, there are different concerns which relate to their capacity to share the content, their criminal culpability and the impact of that behaviour on them personally. Due to the nature of sexting, and its intersection with CSAM being a socio-legal issue, it is important that this topic is examined through an inter-disciplinary framework for a more nuanced understanding. This paper will draw upon criminology and psychology to understand and critique the law related to sexting. This paper argues that the legal consequences for children who perpetrate CSAM offences because of their sexting may not align with their developmental levels.

While some jurisdictions in Australia have addressed children involved in possessing and/or sending CSAM in the form of sexting, overall, Australian jurisdictions do not offer a consistent approach to children who possess and/or send intimate material. Research has called for further discussion of children who participate in sexting without adult involvement and of the capacity of legislation to respond appropriately.⁸ What is of significant relevance to children participating in sexting is that

criminal law does not consistently reflect a child’s age and associated capacity to consent to sexual relations with another person.

This paper, then, circumscribes the intersection between sexting and CSAM into two forms: lawful sexting and unlawful sexting. We argue that there are clear disparities between typical CSAM and sexting between children and, as such, should be reflected in legislation. Similar to Clough,⁹ we propose two options for reform:

1. for online sexual material involving older children to be redefined; and
2. that the definition of CSAM be consistent with the age of consent.

(Difficulties) conceptualising CSAM and sexting

Sexting can fall within CSAM offences in Australian jurisdictions or can sit independently. The criminal provisions relating to CSAM are disparate across jurisdictions, which makes a brief summary of the legislation challenging. Legislation between state, territory and Commonwealth jurisdictions of Australia refer to CSAM using different identifiers including ‘child pornography’, ‘child abuse material’ and ‘child exploitation material’. To enable a comprehensive discussion, this paper will refer to all such material as CSAM for ease and clarity.

CSAM is, generally, dealing with material of a sexual nature involving children. Intricacies in the legislation exist, which means CSAM can include a range of behaviour such as possessing, accessing, procuring and sharing CSAM.¹⁰ The material itself can range in severity from depicting different body parts of a child to capturing the abuse of a child, often involving humiliating and violent sexual acts, with the dissemination of their images.

One of the challenges of legislating to prevent CSAM is to allow the legislative definitions to be suitably broad to capture inappropriate and harmful behaviour against

children. Historically, CSAM laws were enacted to protect children from being exploited by adults and to protect them from the harms of viewing sexually explicit material.¹¹ However, the laws that were originally established to protect children have the ability to criminalise them.¹² For example, between 2006 and 2016, 28 children were sentenced for CSAM offences in Queensland courts.¹³

Children are at risk of criminal prosecution for participating in sexting when the law largely treats sexting in the same category as CSAM. A consequence of the CSAM legislation in Australia is that children participating in sexting, and consenting to the exchange of the intimate material, may not be exempted from prosecution under CSAM legislation.

Australian CSAM and sexting legislation does not always account for the age of the participants. Children may consent to a romantic and/or sexual relationship, yet the law does not allow them to consent to sexting. The difficulty with conceptualising sexting as CSAM is that while a 'child' is generally a person under the age of 18 in CSAM, all jurisdictions in Australia have a lower age of consent to sexual activity, at 16 and 17 years. In turn, while a person of 16 or 17 years of age may be lawfully engaging in sexual activity (excluding anal intercourse), it is unlawful to have material (photos or videos) depicting their behaviour. For example, a 16-year-old may take a sexually explicit photograph of themselves with no intention of distributing it. The conduct in this example potentially encompasses two offences: production and possession of CSAM.¹⁴ In this paper, we argue such consensual behaviour involving 16- or 17-year-olds (in jurisdictions where the age of sexual consent is 16 or 17, respectively) should be considered *lawful sexting*, rather than CSAM, because those children have been deemed competent to participate in sexual activities by virtue of their age.

However, we are not suggesting that all cases of sexting between 16- and 17-year-olds are the same. Sexting may be the result of

non-consensual behaviours through bullying, revenge and blackmail by peers. As such, we argue that cases involving sexual exploitation of 16- or 17-year-olds who can consent to sexual activity normally, but are victims of non-consensual online behaviour at the hands of peers, should be classed as *unlawful sexting*. Such a reconceptualisation would likely mitigate some of the cross-jurisdictional disparities, including the exemptions from criminality, to be outlined in this paper.

Sexting is occurring, yet it is being classified as CSAM in many circumstances. While legislation creates exemptions or defences from CSAM prosecution, these are limited in scope, they can be ambiguous and are disparate between jurisdictions. Sexting is prevalent in Australia, and legislation needs to reflect or acknowledge the changing – and transformative – uses of technology by children.

Prevalence of sexting

The precise prevalence of sexting behaviour among children is difficult to quantify. The prevalence of sexting differs based on the definition used in the study, the sample, the period studied and the age of the children surveyed.¹⁵ Such inconsistent definitions have been suggested to contribute to the confusion over the prevalence of this behaviour.¹⁶ Research indicates that 4% to 25% of children have sent sexual images.¹⁷ In one study that explored 20 European countries, 4.6% of 14- to 16-year-olds took part in sexting.¹⁸ In a different study, involving a nationally representative survey of children aged 12 to 17 years who owned mobile phones in the United States of America, 4% and 15% of children had sent and received online sexual material, respectively.¹⁹

Other studies reflect much higher rates of sexting. For example, one Australian study found 38% of respondents aged between 13 and 15 years reported that they had sent a sexual video or picture of themselves, and 62% had received a sexual video or picture of a

peer.²⁰ In the same study, the researchers found the prevalence increased for respondents aged between 16 and 18 years; 50% sent a sexual video or picture of themselves, and 70% had received a sexual video or picture.²¹ With the advent of the mobile phone with a built-in camera, the forwarding and sending of sexually explicit files has become common among children.²² It is acknowledged that this behaviour is likely far more common than the current international and Australian research appears to indicate.

The law of sexting

Because of the prevalence of online sexual behaviour amongst children, the law should respond appropriately. Currently, sexting fits within the CSAM definition in criminal law legislation, where there is no specific sexting provision because sexting generally involves naked, partially naked or otherwise revealing content of children.²³ Our conceptualisation of sexting being categorised as lawful or unlawful sexting is outlined, according to specific online sexual behaviour, below. Sexting-related offences, or the broader CSAM offences, can apply to 16- and 17-year-old children, depending on the jurisdiction, who:

1. willingly take images/video of themselves (lawful);
2. willingly send images/video of themselves to another peer (lawful);
3. consent to be sent images/video of another peer (lawful);
4. are sent images/video of another peer without consenting to receiving that material from a peer (unlawful); or
5. are sent images/video of another peer and send that content on to other peers without the sender's consent (unlawful).

Sexting can also involve either: children sending images or videos to adults; or adults sending explicit content to children. Given the nature of the adult's involvement in both

instances, this becomes a clearer CSAM offence and, therefore, this behaviour is beyond the scope of this paper.

When the images or videos are distributed by the recipient to others without the consent of the sender, this amounts to 'revenge pornography' or 'non-consensual intimate image sharing'.²⁴ Non-consensual intimate image sharing with peers is a clear violation of trust and consent. As such, it becomes unlawful sexting and should be prosecuted appropriately under relevant sexting or CSAM criminal law provisions.

For example, South Australia directly addresses non-consensual intimate image sharing, making it an offence. The *Summary Offences Act 1953* (SA) engages if images or videos are further distributed beyond the intended recipient of the shared material; that is, the intended recipient further shares them without the sender's consent.²⁵

Another concerning behaviour related to sexting occurs when a child sends another child intimate material, but the recipient did not consent to receiving the material nor do they welcome it. It is the lack of consent which classes this behaviour as unlawful sexting rather than lawful sexting.

Exploring lawful sexting

Lawful sexting, then, becomes an important distinction from unlawful sexting. Legislation that permits or excuses sexting acknowledges a child's capacity to consent to sexual behaviour and is consistent with the existing age of consent rules in the Australian jurisdictions. Some jurisdictions have created specific offences that relate to online sexual behaviour, rather than incorporating that behaviour within CSAM offences. Sexting legislation has not necessarily decriminalised sexting when removing it from the parameters of CSAM but the separation from CSAM offences acknowledges the social and legal differences. SA is one example.

The SA Parliament amended the *Summary Offences Act 1953* (SA) in 2016 to incorporate specific filming and sexting summary offences which fall within the unlawful sexting classification.²⁶ The legislation was drafted because of the ‘changing social and technological trends and [it] reaffirms standards of appropriate conduct, especially involving the use of invasive images depicting minors’.²⁷ In so doing, the legislation makes it unlawful to:

1. engage in humiliating or degrading filming;²⁸
2. distribute an invasive image of another person without their consent;²⁹
3. film another person in a state of undress, engaged in a private act or in circumstances when they would not expect their breasts, genital or anal region to be filmed (indecent filming),³⁰ or
4. threaten to distribute an invasive image obtained through invasive filming.³¹

Enabling criminal prosecution for the above online sexual behaviours is a positive step to condemning unlawful sexting and ensures those inappropriate and harmful behaviours are captured by criminal law legislation. It also separates the behaviour from lawful sexting that is appropriate for 16- and 17-year-olds who can legally engage in sexual relations with peers of the same or similar age.

Jurisdictions criminalising the possession of naked or revealing content of children are trying to curb the spread of CSAM and the destructive consequences for children. There can be legal and psychological consequences for children who take part in sexting. While the legal consequences relate to whether the behaviour can be prosecuted as CSAM in the relevant jurisdictions, the psychological consequences of sexting among children is likely dependent on whether the dissemination and production is non-consensual versus consensual, which also supports distinguishing online sexual behaviour as either lawful or unlawful sexting. The psychological consequences then

lead to legal consequences for children. The wide-ranging impacts for children are addressed below.

Exploitative consequences

Aggravated incidents are classed as those incidents that include additional elements such as deception, extortion or threats; sending images without the knowledge of the children pictured; and children sending images to adults, adults soliciting the images or other adult involvement. The aggravated incidents, causing exploitative consequences, are non-consensual and thus fall within the unlawful sexting category.

The relationship between children taking part in sexting and mental health outcomes appears mixed, with some studies indicating: a protective effect, no correlation or a positive correlation.³² However, some impacts noted include cyberbullying, harassment, mood disorders, suicide, adjustment reactions and anxiety disorders.³³ Being a victim of sexting may result in depression as well as ongoing trauma due to the permanent nature of these files in cyberspace and the harm this may cause the individual.³⁴ An individual may have their image exposed to a larger audience than intended, with bullying being the result. In some cases, the ramifications are extreme; such as an American example involving 13-year-old Hope Witsell’s suicide after her ex-boyfriend shared a topless photo of her causing peer bullying.³⁵

While in some instances there may be no negative mental health outcomes on the young person at the time of the behaviour, the lack of control (eg exposure to the larger audience) may elicit psychological distress.³⁶ Fortunately, however, images are sent on to unintended others in only a minority of cases. For example, in a national telephone survey of adolescents (10 to 17 years) who had engaged in sexting in the United States, 3% of participants had received forwarded images.³⁷

The dynamics of child sexting appear to be influenced by gendered pressures.³⁸ A

gendered double standard seems to exist; males who send images of themselves are judged differently from females who send images of themselves.³⁹ As a result, there can be differences in social consequences for males and females. A male's involvement in sexting can sometimes have a positive impact due to an increase in social status.⁴⁰ In particular, the term 'popularity currency' has been coined to explain how males may use the images as trophies or share intimate pictures (as photographic proof) to gain status in their peer group because they could 'get the girl(s)'.⁴¹ These images essentially become a digital online economy.⁴² This likely explains why males are more likely to receive pictures rather than send images.⁴³

As objectification of sexting is gendered towards females, females appear to suffer more negative social consequences than males.⁴⁴ In such instances, females may be victims of negative female stereotypes.⁴⁵ While it is acknowledged that males who send images can be shamed in some instances, researchers argue it is not comparable with the derogatory implications of being 'slut shamed' as a female.⁴⁶ Females may be pressured to engage in sexting, with research finding adolescent females are at about 70% higher risk of coercive victimisation than adolescent males.⁴⁷ Due to the objectification that may occur if young females share images versus the coerciveness and pressures they may experience if they decide not to engage in the behaviour, the literature has highlighted young females as being 'damned if they do, damned if they don't'.⁴⁸

Associations between sexting and offline risk behaviours have been found. For example, sexting has been found to be associated with delinquent behaviours⁴⁹ as well as substance abuse (eg alcohol, cigarettes and marijuana).⁵⁰ Sexting is positively correlated with having unprotected sex.⁵¹ There is also a significant link between the perpetration and victimisation of coercive sexting and traditional forms of sexual coercion.⁵² These sexually coercive

behaviours include: pressuring a partner into sex through the use of threats, insisting on sex when the partner did not want to and pressuring the partner to have sex without a condom.⁵³ Consequently, coercive sexting may be linked to a larger pattern of dating violence. These theoretical considerations highlight the importance of an unlawful sexting distinction.

Non-exploitative consequences

Experimental incidents do not involve criminality beyond the sending or creation of the incidents; they involve willing participants and they lack malice.⁵⁴ The experimental online sexual behaviour (causing non-exploitative consequences) are characterised as consensual so fall within the scope of lawful sexting.

Most research to date has focused on the negative psychological outcomes of sexting. Limited attention has been given to positive outcomes of online sexual behaviour;⁵⁵ that is, in lawful sexting cases. Research on sexting often starts with an adult-oriented moral agenda in which the behaviour is seen as a negative risk.⁵⁶ Privileging adult perceptions could reproduce the double standards and inequalities, denying the younger voices being heard and perpetuating the legal discrepancies between lawful sexting and the age of consent.⁵⁷ It is imperative that we understand both the negative and positive aspects of this sexual behaviour in order to garner a more wholesome understanding of this multifaceted issue and, potentially, assist in the development of safeguards.⁵⁸

Online sexual behaviour can be consensual and is not always harmful. In fact, most children do not report significant harm or distress⁵⁹ and sometimes perceive the behaviour as positive and respectful when it involves two consenting individuals.⁶⁰ Sexting is sometimes considered normal sexual communication,⁶¹ in line with current technological, social and sexual environments. Children may create self-generated images as a way of enhancing a sexual relationship, experimentation and flirting.⁶² Such behaviour has been suggested to

strengthen trust and intimacy between romantic partners⁶³ as well as improve one's image of one's body⁶⁴ through obtaining feedback about one's physical appearance.⁶⁵ Some children even engage in sexting as a form of bonding with friends, including those of the same gender, as a digital 'truth or dare'.⁶⁶

Some scholars suggest this practice between peers might be considered as a safer alternative to physical intercourse, as sexually transmitted infections and pregnancy cannot result from sexting alone.⁶⁷ Further, sexting may serve as a substitute for those not wanting to have physical intercourse due to religious or other reasons.⁶⁸ From a normalcy discourse, consensual forms of sexting are considered to support children in terms of sexual expression, sexual agency and sexuality exploration.⁶⁹

Legal consequences

In the changing technological environment, when children have access to technology that can victimise them, there can be unintended effects arising from CSAM legislation. Namely, children who take images or videos of *themselves* are unintentionally possessing CSAM. Children in the United States have been prosecuted and could be registered as sex offenders for doing just that.⁷⁰ Without sexting exceptions for CSAM offences, Australian children are at risk of prosecution for engaging in sexting. Anomalies exist across Australian jurisdictions in relation to exemptions from criminality for online sexual behaviour.

Some jurisdictions remove 'selfies' from the parameters of CSAM prosecution because the material only features the child and it was the child themselves who created the content. NSW's new sexting legislation also exempts children from criminality for possessing CSAM if that material only depicts themselves.⁷¹ Children in South Australia who take 'invasive' images or videos of themselves are not penalised under South Australian legislation for possessing that material themselves. Invasive material, for the purposes of South

Australian sexting provisions, depicts a person either engaged in a private act or in a state of undress such that 'bare breasts' or 'the bare genital or anal region' is visible.⁷²

The type of content sent to peers can determine whether the sexual material is CSAM and thus subject to prosecution. In Victoria, CSAM legislation protects children who send and receive *images* in prescribed circumstances. However, those protections relate only to images.⁷³ If children are sending and/or receiving videos or any other content beyond images, they will not be covered by the legislative exceptions, which means the CSAM offences may apply to them. This is a further limitation to the legislative protections for children, given children who can capture images on electronic devices can also take videos.

Other jurisdictions prescribe specific defences for children who possess CSAM in the course of participating in sexting. In Victoria, children are protected from prosecution if they possess an image of themselves that would otherwise be considered as CSAM.⁷⁴ Further, when a child (aged 16 or 17) voluntarily shares an image of themselves with another person (who is *no more than two years older* than the child), the *similar age exception* exists, where the recipient is protected, provided that they do not further distribute the image. The legislation is silent about its application to children younger than 16, so the legislative defences, arguably, would not apply to those children.

The criminal law in other jurisdictions is silent when it comes to children taking revealing photos or videos of themselves. Because CSAM offences relate to possessing invasive images or videos, those children are often contravening the law by nature of keeping the material they took of themselves. For example, NSW excuses children from prosecution for CSAM where those children receive online sexual material if it was unsolicited and they take reasonable steps to dispose of it.⁷⁵ NSW legislation does not address our conception of lawful sexting where the receipt of material is

solicited and/or the child retains possession of the material, which means that behaviour could be classified as a CSAM offence.

A child distributing sexual material to another child is equally as problematic under criminal law in the jurisdictions of Australia. CSAM legislation does not distinguish between categories of the sender's age or any other factors. Some minor variations exist between jurisdictions, such as the Australian Capital Territory (ACT) prescribing a defence if a person had no reasonable grounds for suspecting the material was CSAM;⁷⁶ Tasmania criminalises possession and distribution of CSAM where the person knew or ought to know the material is CSAM.⁷⁷ The defendant child would then need to establish that they were unaware sexting amounted to CSAM. However, generally, a child sending revealing material of themselves to another is categorised as CSAM and liable to the penalty which varies between jurisdiction from 7 years imprisonment up to 15 years.⁷⁸

Despite sexting normally occurring between children in a relationship or who are otherwise connected to each other and share the material consensually, the law does not generally distinguish sexting from CSAM. So a child's online sexual behaviour is criminal conduct in most jurisdictions. The law does not consider why children might participate in sexting and it is these motivations that support the argument for a lawful and unlawful sexting distinction.

Motivations for sexting

Sexting among children most commonly occurs in situations where individuals are engaged in a romantic relationship.⁷⁹ In one national United States study, children aged 10 to 17 years were surveyed about their motivations for sending and receiving sexually explicit photos and videos.⁸⁰ Most children who received (54%) and sent (51%) the files said it was due to 'romance as part of an existing relationship'. This motivation was followed by receiving (23%) and sending (11%) the files

as a prank or joke. Very few cases involved receiving (4%) and sending (3%) the files due to bullying, harassment, blackmail, coercion, threats, revenge or conflict.

Norms have been used in the literature to explain why children may engage in sexting. In particular, personal injunctive norms refer to what the individual thinks they *should* do in a certain context, which may relate to approval (or disapproval) of a certain behaviour or acceptability for the behaviour.⁸¹ One study found that, of children who believed sexting was acceptable, almost 30% had sent online sexual material compared with about 5% of children who believed the behaviour was 'always wrong'.⁸² The results of this study support the association between teenagers' personal injunctive norms of the behaviour and their own behaviour. Importantly, this study found possible legal consequences were not a deterrent in engaging in sexting; children who were privy to the legal consequences were more likely to engage in sexting than children who were less aware of the legal consequences.⁸³

Further to personal injunctive norms, children are greatly oriented towards their peers and are responsive to the influence of their peers;⁸⁴ in fact, the presence of peers increases the degree of the child's preference of immediate rewards.⁸⁵ Children are more responsive and preoccupied with their peers than adults.⁸⁶ Researchers have argued sexting may occur among children because they might feel it is normative among their peers.⁸⁷ Research has found children were more likely to send sexually explicit images if they knew peers who too had sent sexually explicit images, compared with those who had not previously sent sexually explicit images.⁸⁸ Interestingly, perceived social norms of peers appear to be the most influential predictor of a young person engaging in sexting,⁸⁹ over and above the young person's attitude towards sexting.⁹⁰ Social norms, then, influence online sexual behaviour, which should correlate to a child's age of consent.

The age of consent

A child's age of consent to participate in a sexual relationship is not always relevant to CSAM criminality. The CSAM legislation does not consider a child's age or maturity. A person is either a child or an adult under CSAM and sexting criminal law provisions. In the context of sexting, while a child may have reached an age to engage in sexual relations with another person, they have not reached an age (as an adult) to be able to take photos of themselves and share it with others in most Australian jurisdictions. As such, the age of consent for sexual intercourse should be intrinsically linked to children participating in sexting.

Consent

The age of consent for sexual intercourse (not anal intercourse) varies between the Australian jurisdictions. South Australia and Tasmania prescribe that children 17 years and older can engage in sexual intercourse.⁹¹ All other states and territories prescribe the age of consent for sexual intercourse to be 16.⁹² Children under 16 or 17 respectively are not deemed to possess the requisite capacity to participate in sexual intercourse, so engaging in sexual intercourse with a child below the age of consent is a criminal act.

Some jurisdictions prescribe defences to criminal charges of unlawful sexual intercourse; that is, sexual intercourse when a child is below the age of consent. It is a defence in the ACT for a child between the ages of 10 and 16 to engage in sexual intercourse provided that they consented and their partner is no more than 2 years older than them.⁹³ A similar defence applies in Victoria whereby the child is 12 to 16 years old, they consented to sexual intercourse and their partner is no more than 2 years older than them.⁹⁴ South Australia provides a defence for a child to have sexual intercourse at the age of 16 years, provided their partner is no more than 17 years of age.⁹⁵ Tasmania defends the conduct of a person who has sexual intercourse with a child

15 years or older, provided the person is no more than 5 years older than that child.⁹⁶ Further, Tasmania also prescribes a defence where a child is 12 years of age or more and they have sexual intercourse with a person no more than 3 years older than them.⁹⁷

The age of consent relates to the age a child has been objectively determined to have the capacity to consent to sexual relations. Children over the age of consent have the same capacity determinations for sexual intercourse as adults. Children under the age of consent, then, have been considered to lack the capacity to consent to sexual relations regardless of their maturity to make a decision about their sexual activity.

In jurisdictions where defences to criminal conduct exist for children to engage in sexual relations under the age of consent, courts need to establish the child's ability to consent to sexual relations. Valid consent is defined in statute in most jurisdictions and is usually considered to be when a person *freely* and *voluntarily* agrees to sexual activity.⁹⁸ If the child freely and voluntarily agrees to participate in sexual activity and they have the capacity to consent, a defence against criminal culpability can be invoked.

Consent to participate in sexting is not related to the age of consent under criminal law legislation in most Australian jurisdictions. Most parliaments have not determined a child's maturity to participate in sexting as relevant to the age of consent to sexual relations, despite sexting predominantly occurring as part of a sexual or romantic relationship. So, while a child may have the legal authority to consent to sexual intercourse with another child, that authority has not been extended to their participation in sexting with another child. In circumstances where a child has the capacity to consent to sexual intercourse, their online sexual behaviour should also be permitted and considered distinct from CSAM.

CSAM provisions do not distinguish between ages of the offender but do distinguish between the age of the victim. The age

of a child, as a victim of a CSAM offence, differs between jurisdictions. In five jurisdictions, the age of a child, as a victim of CSAM, is under 18;⁹⁹ in three jurisdictions, the age is under 16;¹⁰⁰ and in South Australia, the age is under 17.¹⁰¹ So, in ACT, Northern Territory (NT), Tasmania, Victoria and the Commonwealth, a child can consent to sexual intercourse but still be considered a victim of CSAM. Only Queensland, Western Australia and South Australia have consistency between CSAM offences and online sexual behaviour, with Queensland and Western Australia's CSAM provisions applying to children under 16, which aligns with the age of consent to sexual intercourse, and SA's CSAM provisions and age of consent corresponding at 17 years of age.

As such, the definition of CSAM should be consistent with the age of consent across all jurisdictions. Where a child can consent to sexual relations with another child (or adult), or criminal liability is waived because of an age exception/defence, that consent should also involve the capacity to participate in sexting. Excluding sexting yet allowing sexual intercourse seems to be a strange and irreconcilable dichotomy or oversight in child protection laws.

Further, redefining material involving children 16 years or over supports a sexting distinction from CSAM. Older children may engage in sexting partly due to specific individual characteristics, such as age.¹⁰² For example, research highlights sexting is more common among older adolescents (16 and 17 years) than younger adolescents (12 to 15 years).¹⁰³ As such, considering a child's neuropsychology is relevant to determining their cognition to participate in sexting.

Neuropsychology and the law

Proponents of the current legislation may argue older children have similar reasoning capabilities about risks to that of adults, therefore, children who participate in unlawful sexting should be tried in the criminal justice

system for possessing and sharing CSAM. In fact, 'logical reasoning' is fully developed around age 15;¹⁰⁴ research has found only small developmental differences between older children and adults on perceived harmful consequences of certain behaviours.¹⁰⁵ However, these proponents may be unaware that psychosocial factors do not reach maturity until early adulthood.¹⁰⁶ Children and adults greatly differ in psychosocial factors, including: susceptibility to peer pressure, sensitivity to rewards, self-regulation ability and future orientation.¹⁰⁷ In turn, while a teenager might engage in unlawful sexting, and perceived as able to take part in competent decision making (logical reasoning maturity), they may be held accountable for their poor decision-making capacity (psychosocial immaturity).

The psychosocial immaturity proposition is supported by advancements in developmental neuroscience, termed the 'dual systems model'.¹⁰⁸ This model suggests adolescent risk-taking is the outcome of the interaction between two brain networks: the 'socioemotional network' and the 'cognitive-control network'. The socioemotional network, mainly localised in inner regions of the brain, is responsive to emotional and social stimuli.¹⁰⁹ This network is sensitive particularly in early adolescence during pubertal changes.¹¹⁰ Changes to this system in puberty may result in impulsive, sensation-seeking behaviour.¹¹¹ The cognitive-control network, mainly localised in outer regions of the brain, builds executive functions concerning self-regulation, consequential thinking and planning. However, this system, which governs cognitive control, develops over adolescence and into early adulthood.¹¹² The evidence suggests these two brain systems have distinct developmental trajectories, and with the temporal gap between the two systems, adolescence appears to be a period of inherently immature judgment.¹¹³

At present, legal consequences for youth who perpetrate sexting align with their cognitive-control network maturity in contrast to their socioemotional maturity. This is

problematic when the neuroscientific research suggests increased risk-taking during adolescence appears to be biologically driven and normative.¹¹⁴ With increases in sensation seeking and delayed behaviour controls during this period, it has been described as 'starting the engines without a skilled driver'.¹¹⁵

We are not arguing that the accountability of adolescents who engage in unlawful sexting should be surpassed. Rather, we suggest there is a clear need to re-examine juvenile justice policy in light of the scientific evidence.¹¹⁶ The legal consequences should consider socio-emotional maturity. Mitigation plays a vital role in the calculation of punishment and blame and should be at the centre of youth crime.¹¹⁷ The research clearly denotes that children should not be classed as culpable as adults, due to their lack of maturity.¹¹⁸ Shaping juvenile justice policy through scientific research will promote fairness and social welfare.¹¹⁹

Prevention

Prevention, in the context of this article, relates to addressing sexting-related behaviours, the impact of sexting and the impact of the existing criminal law. As discussed above, the consequences for children participating in sexting can be wide-ranging. In some instances, children will share sexual content of themselves and no adverse effects on them will arise. However, sexting can affect a child's reputation and self-esteem. Because some children who participate in sexting are 'naïve and misguided', their actions can result in them sharing compromising material with a predator. Sexting can also result in bullying, where images are used for revenge pornography; can enable rape or sexual assault; or be serious enough to warrant prosecution for possession and dissemination of CSAM. Prosecution can be concerning for children who participate in online sexual behaviour.

Prior to criminal prosecution for CSAM offences, police can exercise discretion *not* to

prosecute children for sexting behaviour. Queensland police, for example, may exercise their discretion to refrain from charging children who are found to engage in sexting which contravenes criminal law. Where Queensland police become aware that children possess CSAM connected with sexting, they will investigate to determine whether criminal action is warranted. Queensland police have the discretion to use alternative approaches to deal with sexting behaviour, apart from prosecution, including 'prevention and education'. Specifically, they consider whether:

1. the child is a willing or knowing participant;
2. the age and mental capacities of the participants;
3. the nature of the relationship between the participants; and
4. the context of the sharing.¹²⁰

Other options for police to avoid criminally prosecuting children under CSAM offences is to utilise discretion and diversion from the criminal justice system. Discretion and diversion are usually available in the form of warnings, cautions and conferencing under the jurisdiction's youth justice legislation.¹²¹ For example, between 2006 and 2016, 1470 children in Queensland were diverted from court by a conference or formal caution for CSAM offences.¹²²

While police policy, discretion and diversion are helpful responses to ensure children are not unnecessarily prosecuted, managing sexting in these ways may not be enough to prevent child prosecutions for sexting when criminal law makes children's involvement in sexting a CSAM offence. As such, reconceptualising the relevant CSAM behaviour as lawful and unlawful sexting would address the challenges of children participating in online sexual behaviour, particularly when the criminal law legislation in many Australian jurisdictions makes sexting, even between consenting children, a criminal offence.

Preventing sexting among children has been a contentious topic. The traditional prevention practice of educating children on the dangers of particular behaviours may be ineffective, particularly for those children who score higher on impulsivity and sensation seeking than other adolescents.¹²³ Health communication research identifies the need to educate those who score high on sensation seeking through messages high in sensation value.¹²⁴ As aforementioned, the influence of social pressure appears to be a primary motivation among adolescents to engage in sexting.¹²⁵ In turn, there is a great need to discuss peer pressure and the ‘acceptability’ of sexting in preventative awareness-raising initiatives that challenge power dynamics and equip children with skills needed to overcome pressure that they may face.¹²⁶ Personal injunctive norms and perceived social norms also need to be considered in the design of prevention initiatives. Researchers have argued the importance of sexting being included in sex education programs along with the legislative impacts, peer norms and addressing the recurring double standard in gender.¹²⁷ Through adolescents gaining greater understanding into online sexual behaviour from multiple standpoints – like we have provided in this paper – they may be better informed when it comes to sexting.

Conclusion

While the consequences for sexting are wide-ranging, in most cases, children engage in sexting willingly, with consent and with little adverse effect. Despite this, there are a range of legal and social consequences which can impact them. Sexting is often categorised as CSAM in most criminal law statutes, which means children are committing CSAM offences for corresponding with their peers in a form which is becoming more normalised because of the transformative nature of technology and their peer-to-peer interactions. Instead, sexting should align with the age of consent to sexual intercourse, given criminal

law already defines 16- or 17-year-olds as possessing the capacity to consent to sexual activity. Sexting should be further categorised for 16- or 17-year-olds as lawful or unlawful sexting because of the legal and social consequences of online sexual behaviour. When adopting a multifaceted approach to this phenomenon, we begin to understand that current legal consequences of sexting for 16- and 17-year-olds do not appear consistent with the neuropsychological research. As sexting is a multi-layered issue, it is important that this topic continues to be examined through an inter-disciplinary framework to garner a more nuanced understanding. Such an approach will also assist with informing prevention efforts.

Ethical standards

Declarations of conflicts of interest

Dominique Moritz has declared no conflicts of interest Larissa S. Christensen has declared no conflicts of interest.

Ethics approval

This article does not contain any studies with human participants or animals performed by any of the authors.

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